No. 92-479

Supreme Court, U.S.
FILED
MAR 3 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

TXO PRODUCTION CORP.,

Petitioner,

vs.

ALLIANCE RESOURCES CORP., THE TUG FORK LAND COMPANY, GEORGE KING and GROVER C. GOODE,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS IN SUPPORT OF RESPONDENTS

I. INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The National Association of Securities and Commercial Law Attorneys ("NASCAT") is an association of law firms and attorneys who litigate antitrust, commercial, consumer, environmental and securities fraud cases in federal and state courts. NASCAT and its members are devoted to representing victims of corporate abuse, fraudulent schemes and so-called "white-collar" criminal activity in cases that have the potential for advancing the

state of the law, educating the public, modifying corporate behavior, deterring wrongdoers and improving the access of victims to justice and adequate compensation for the wrongs that have been inflicted upon them. NASCAT and its members advocate the enactment and enforcement of effective laws to protect investors, consumers and small businesses from fraudulent, deceptive and manipulative practices. NASCAT's members frequently represent plaintiffs in a variety of individual, class action and derivative cases prosecuted under the federal antitrust, securities and environmental laws, equivalent statutes of the fifty States and state common law governing fraud and deceit, breach of fiduciary duty and similar torts. NASCAT and its members have an interest in the effective private enforcement of such statutes and in the development of case law that effectively deters wrongdoers.

Punitive damages are an important weapon in the efforts of NASCAT members to enforce laws protecting investors, consumers, small businesses, the environment and the integrity of the securities markets. Accordingly, NASCAT files this *amicus curiae* brief with the written consent of the parties in support of Respondents and urges this Court to affirm the decision of the court below.[1]

In *TXO*, the West Virginia Supreme Court of Appeals affirmed a jury verdict for Respondents, finding that

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[1] The decision of the Supreme Court of Appeals of West Virginia is reported as *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E. 2d 870 (*"TXO"*), *cert. granted*, ___ U.S. ___, 113 S. Ct. 594 (1992).

Petitioner, TXO Production Corporation ("TXO"), a subsidiary of USX, had knowingly and intentionally brought a frivolous declaratory judgment action against Respondents to clear a purported cloud on title. TXO's real intent, as the court below found, was to reduce the royalty payments under a 1,002.74 acre oil and gas lease. Respondents counterclaimed alleging that TXO's actions were a slander of title. The McDowell County, West Virginia, jury which heard the evidence at trial returned a verdict in favor of Respondents, awarding them $19,000 in compensatory damages and $10 million in punitive damages. 419 S.E. 2d at 875. In its exhaustive opinion, the West Virginia Supreme Court of Appeals held that the jury had properly weighed conflicting evidence and found the "requisite malice" for an award of punitive damages against TXO, *id.* at 878. The court further concluded that the evidence showed that it had committed "unsavory and malicious practices," *id.* at 880. Significantly, the court below stated that "the record shows that this was not an isolated incident on TXO's part – a mere excess of zeal by poorly supervised, low level employees – but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power vis a vis TXO's superior legal firepower." *Id.* at 881.

The court below also held that the trial court had properly admitted, under W. Va. R. Evid. 404(b), uncontradicted testimony by four lawyers to negate TXO's trial defenses of "good faith or the lack of malice." *Id.* Respondents offered the undisputed evidence of similar wrongful conduct engaged in by Petitioner in Louisiana, Texas and Oklahoma, *id.* at 881-83, "to disprove TXO's good faith defense and to show that this case was but part of a

pattern and practice of deception and chiseling by TXO." *Id.* at 883.

This much of the record in this case and the decision of the court below is beyond dispute. TXO has been found guilty of intentional, malicious acts directed toward Respondents, as well as a pattern and practice of fraudulent and deceptive conduct targeting other persons similarly situated. Taking all of the evidence (both disputed and otherwise) into account, the jury returned a verdict for Respondents on their counterclaim for slander of title and awarded compensatory and punitive damages. Thus, the only issues before this Court concern whether the trial court's jury instructions, the jury's award of $10 million in punitive damages, the trial court's post-verdict review of that award, and appellate review of the verdict satisfy the standards of procedural and substantive due process applied by this Court in *Haslip v. Pacific Mutual Life Ins. Co.*, 499 U.S. ___, 111 S. Ct. 1032 (1991) ("*Haslip*").

NASCAT supports Respondents' position and believes that the decision of the court below should be upheld for several reasons. First, this Court must recognize that the States are responsibly modifying their statutes and common law to accommodate reasonable public policy concerns about punitive damage awards; indeed, as this Court recently acknowledged, "[p]unitive damages have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).[2]

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[2] *See also Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) ("In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages, and the factors the jury may consider in determining their amount, are questions of state law.").

Even *amici* supporting Petitioner concede that the States "are free to establish different standards for use by juries in fixing the amount of punitive damages." Brief of Arthur Andersen & Co., *et al.*, at 11. Over the past ten years the State legislatures – the elected representatives of the people – have overhauled the punitive damage laws of nearly every State and have enacted numerous different safeguards including (1) imposing statutory "caps" or proportionality rules on punitive damage awards; (2) requiring a finding of clear and convincing evidence (or even proof beyond a reasonable doubt) before such damages may be awarded; (3) requiring bifurcated trials, or (4) some combination of several of these measures. As demonstrated herein, *see* Part II.A. and Appendices A-F, *infra*, these changes in State law accommodate public policy concerns raised by Petitioner and its *amici* and are responsive to this Court's mandate in *Haslip*. The present system satisfies due process because it does not leave the jury without meaningful restraints and, to the extent further modification is needed, this Court should leave reform of punitive damages law to the political process, as Justices Scalia and O'Connor acknowledged in *Haslip*.[3]

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[3] Justice Scalia stated in his concurring opinion in *Haslip*, decided just two years ago:

> State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so. See, *e.g.*, Alaska Stat. Ann. § 09.17.020 (Supp. 1990) (punitive damages must be supported by "clear and convincing evidence"); Fla. Stat. § 768.73(1)(a) (1989) (in specified classes of cases, punitive damages

When this Court addresses state law its primary concern is the constitutionality, not the wisdom, of the law. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("We would not, of course, invalidate state law simply because we doubt its wisdom. . . . "). While the distinction may be difficult to draw in practice with the due process clause, in particular, because "reasonableness" and "fairness" are elements of both wisdom and due process, this Court "should hesitate to overturn long-established law on due process grounds without overwhelming evidence that the law is indeed unreasonable and unfair" and "such overwhelming evidence is not to be found" because, "[o]n the contrary, the present system satisfies due process." Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L.J. 859, 915 (1991).[4]

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are limited to three times the amount of compensatory damages); Va. Code § 8.01-38.1 (Supp. 1990) (punitive damages limited to $350,000). It is through those means – State by State, and, at the federal level, by Congress – that the legal procedures affecting our citizens are improved.

111 S. Ct. at 1054 (Scalia, J., concurring); *see also id.* at 1067 (O'Connor, J., dissenting) ("As a number of effective procedural safeguards are available, we need not dictate to the States the precise manner in which they must address the problem. We should permit the States to experiment with different methods and to adjust these methods over time.").

[4] In his insightful article analyzing this Court's decision in *Haslip*, Professor Riggs of Brigham Young University offered the following (unsolicited) guidance to this Court:

> The law of punitive damages may (or may not) stand in need of substantial reform. If reform is needed, constitutionalizing the law is a clumsy, inappropriate way to achieve it. The due process clause undoubtedly could be used as an instrument of reform because its contours are so vague and its substance so amorphous. For that very reason, however, the Court should hesitate to read new meaning into it unless fundamental rights can be protected in no other way. Otherwise due process becomes a cover for judicial legislation, a function now wholly eschewed by the Court in the past but one not conferred by the Constitution. A punitive damages claim involves no right more fundamental than money, and it is peculiarly amenable to legislative reform. Many legislatures have already given consideration to the matter. Without a clear mandate from the Constitution, the Court should leave reform of punitive damages law to the political process.

Id. at 917.

In addition, the federal circuit and district courts and state trial and appellate courts have considered dozens of challenges to punitive damage awards since *Haslip* was decided by this Court. As detailed herein, *see* Part II.B., *infra*, those courts are fairly applying the substantive and procedural due process standards established by this Court in *Haslip*, 111 S. Ct. at 1041-46, as demonstrated by the careful trial and appellate court review of the $10 million punitive damages award at issue here. *See TXO*, 419 S.E. 2d at 886-90. Post-*Haslip* cases from other jurisdictions demonstrate that the federal and state trial and appellate courts are following this Court's mandate to ensure that (1) juries are permitted to consider only admissible evidence when determining whether defendants are guilty of fraud, malice, or oppression, the predicates to any punitive damages award;[5] (2) juries are

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[5] Most courts have adopted the criteria set forth in the *Restatement (Second) of Torts* § 908(2) (1979):

properly instructed as to what factors must be considered before punitive damages may be awarded; (3) trial courts are conducting careful post-verdict reviews of punitive damage awards and setting aside (or reducing by remittitur) those awards which are excessive and/or unsupported by the evidence; and (4) appellate courts are meticulously reviewing such awards to ensure that substantive and procedural due process has been provided.

Finally, NASCAT believes that the availability of punitive damages is an essential weapon in the continuing struggle which consumers, investors and small businesses must wage against fraudulent schemes[6] and

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> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

See, e.g., Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 740 (3d Cir. 1991) (applying Pennsylvania law), *cert. denied*, ___ U.S. ___, 112 S. Ct. 3034 (1992). For a state-by-state summary of types of wrongful conduct giving rise to liability for punitive damages, *see* R. Schloerb, R. Blatt, R. Hammesfahr & L. Nugent, *Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States and Its Territories* 18-26 (1988). For examples of state pattern jury instructions specifying when punitive damages may be awarded, *see* 1 L. Schlueter & K. Redden, *Punitive Damages* 204-39 (2d ed. 1989).

[6] The financial costs incurred by society as a result of fraudulent activity are enormous. In 1974, the U.S. Chamber of Commerce estimated that approximately $42 billion was lost to fraud per year. Chamber of Commerce of the U.S., *A Handbook on White Collar Crime: Everyone's Problem, Everyone's Loss* 6 (1974). A decade later, the Attorney General of the United States observed

white-collar crime[7] which constantly threaten to cheat them of their hard-earned savings and opportunities.[8]

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that white-collar crime, principally fraud, costs society nearly $200 billion annually. 1985 Att'y Gen. Ann. Rep. 42; *see also White Collar Crime: Hearings Before the Senate Committee on the Judiciary*, 99th Cong., 2d Sess. Parts I-III (1985). That now dated annual loss figure is similar in dimensions to our nation's drug problem, which is most often described as an epidemic. *See Drug Enforcement: Hearings on H.R. 526 Before the Subcommittee on Crime of the House Committee on the Judiciary*, 99th Cong., 2d Sess. 1 (1986) (remarks of Rep. Hughes) ($110 billion spent annually on drugs while lost productivity costs approximately $60 billion per year).

[7] The Chief Justice has stated that "[w]hite-crime is 'the most serious and all-pervasive crime problem in America today.'" *Braswell v. United States*, 487 U.S. 99, 115 n.9 (1988) (quoting Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 Am. Crim. L. Rev. 287, 288 (1980)). The Chief Justice added, "[a]lthough this statement was made [by Rep. Conyers] in 1980, there is no reason to think the problem has diminished in the meantime." *Id.* Unfortunately, this pattern of lawlessness has been present throughout much of modern history and it shows no signs of abating, as demonstrated by the facts of this case. Writing in the early days of this century, Louis Brandeis prophetically stated, "[t]he goose that lays the golden eggs has been considered a most valuable possession. But even more profitable is the privilege of taking the golden eggs laid by someone else's goose." L. Brandeis, *Other People's Money* 17-18 (1914).

[8] *See* The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 33-34 (1967) ("Fraud is especially vicious when it attacks, as it so often does, the poor or those who live on the margin of poverty. Expensive nostrums for incurable diseases, home improvement frauds, frauds involving the sale or repair of cars and other criminal schemes create losses which are not only sizeable in gross but are also significant and possibly devastating for individual victims.").

The continued availability of punitive damages, in the words of the West Virginia Supreme Court of Appeals, "give[s] individual plaintiffs a sword with which to fight well-armored, bureaucratic defendants." *TXO*, 419 S.E. 2d at 888. Private citizens, investors and small businesses should not be deprived of one of their most effective weapons to combat fraud and white collar crime; indisputably, the threat of punitive damages properly and effectively deters individual and corporate wrongdoers from engaging in fraudulent schemes,[9] especially when measured by the actual or potential fruits of their wrongdoing.[10] Any rule of law which makes punitive damages

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[9] Since colonial days, this Court, the lower federal courts and the courts of the fifty States have recognized that the purpose of punitive damages is to punish wrongdoers and deter similar wrongful conduct by other persons or entities. *See Wackenhut Applied Technologies v. Sygnetron*, 979 F.2d 980, 985 (4th Cir. 1992) (applying Virginia law) ("The purpose of punitive damages is to punish and deter.") (citation omitted); *Adams v. Murakami*, 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P.2d 1348, 1350 (1991) ("The public's goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers.") (citation omitted); *Restatement (2d) of Torts*, § 908(2), comment (b) (1979) ("[T]he purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence.").

[10] It is well settled (and undisputed by various *amici* who support Petitioner) that "[t]he amount of gain or profit that the defendant has received from the plaintiff as a result of his misdeeds is an appropriate element in measuring deterrence." Brief *Amici Curiae* for the American Council of Life Insurance, *et al.*, at 15 (citing *Haslip*, 111 S. Ct. at 1045); *see also id.* at 15-16 ("The defendant's profits from his misconduct – or, in some cases, the expected profits where the defendant fails to profit as expected – are objectively-based and often ascertainable without substantial difficulty."); *see also* Brief of Arthur Andersen &

less available concomitantly lessens their necessary deterrent value.[11]

In contending that they are unfairly caught in the web of tort litigation and that the present system of awarding punitive damages threatens their existence, the "Big Six" accounting firms who appear as *amici* for Petitioner have apparently forgotten their undisputed contribution to this country's ongoing savings and loan crisis by failing to fulfill their "public watchdog" role. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984). The General Accounting Office (GAO) and the Office of Thrift Supervision (OTS) have been sharply critical of the accounting profession for its utter failure to uncover widespread fraud in failing financial institutions,[12] and (former federal prosecutor) Judge Royce C.

Co., *et al.*, at 11 (observing that "courts adjudicating constitutional challenges to punitive [damages] awards can and should look to the various factors that have been identified by legislatures, courts, and commentators as reasonable considerations in fixing the proper amount of punitive damages . . including profitability to the defendant . . . [and] the potential and actual harm caused by the defendant's conduct. . . . ").

[11] Professor Dorsey Ellis, one of the leading academic commentators on the subject of punitive damages, identifies seven objectives for punitive damages that he gleans from judicial opinions and related commentary: (1) punishment of the defendant; (2) specific deterrence (to prevent the defendant from repeating the offense); (3) general deterrence (to prevent others from committing similar offenses); (4) preservation of the peace; (5) inducement for private law enforcement; (6) compensation to victims for otherwise uncompensable losses; and (7) payment of the plaintiff's attorney's fees. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 3 (1982).

[12] Running through the ongoing savings and loan crisis is the general problem of fraudulent financial reporting. When

Lamberth wrote that "[a]ccounting firms may have been responsible for many of the abuses which have led to this country's savings and loan crisis. In fact, OTS advised the court that approximately one-third of the 690 financial institutions that have failed were audited by Ernst & Young or its predecessor." *Director of Office of Thrift Supervision v. Ernst & Young*, 786 F. Supp. 46, 52 (D.D.C. 1992); *see also* Berton, *Big Accounting Firms Face Ban in S&L Bailouts*, Wall St. J., Mar. 14, 1990, at A3, col. 1 (reporting

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such aberrant behavior occurs, widespread consequences result, sometimes causing a devastating ripple effect. *See* Nat'l Comm'n on Fraudulent Fin. Reporting, *Report of the National Commission on Fraudulent Financial Reporting* 4 (1987). The GAO has been sharply critical of the accounting profession – most notably, *amicus curiae* Ernst & Young – for its utter failure to uncover the widespread fraud in these failing financial institutions:

> We conclude that for 6 of the 11 S&Ls, CPAs did not adequately audit and/or report the S&Ls' financial or internal control problems in accordance with professional standards. The CPA's problems involved (1) inadequate audit work in evaluating loan collectibility and (2) inadequate reporting on S&Ls' accounting practices, regulatory compliance, and internal controls. The nature of the audit and reporting problems was significant enough to warrant our referring the CPA firms performing the audits to regulatory and professional bodies for their review.
>
> The latest audit reports for the 11 S&Ls before they failed showed combined positive net worth totaling approximately $44 million. At the time of the S&Ls' failures, which ranged from 5 to 17 months after the date of the last audit reports, the 11 S&Ls had combined negative net worth totaling approximately $1.5 billion.

GAO, *CPA Audit Quality: Failures of CPA Audits to Identify and Report Significant Savings and Loan Problems* 1 (1989).

that six of the biggest accounting firms – five of the Big Six (excluding Price Waterhouse) – were banned from doing new work for thrifts by the Resolution Trust Corporation because of past faulty audits).[13] Commenting on accountants' central role in either looking the other way, fending off federal and state regulators, or neglecting to scour errant thrift institutions' books too carefully, former SEC enforcement chief and now Judge Stanley Sporkin wrote: "Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?" *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990).

In their *amicus curiae* brief, the Big Six accounting firms complain that they are "[c]hronically targeted by plaintiffs as the 'deep pocket' in various types of commercial tort litigation," and that they are often unfairly sued, "even though any culpability on their part is almost always many orders of magnitude less than others involved in a particular transaction," Brief of Arthur Andersen & Co., *et al.*, at 2, 19. Conveniently, the Big Six

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[13] *See also* Note, *Are the Accountants Liable? Auditor Liability in the Savings and Loan Crisis*, 25 Ind. L. Rev. 475, 486 (1991) (observing that from the beginning of the thrift crisis, some institutions were given "clean" audits only to be declared insolvent shortly thereafter); Harris, *The S&L Looters Who May Get Away*, Wall St. J., Feb. 12, 1990, at A12, col. 3 (noting that "crimes in thrifts . . . often required the cooperation of groups of people, in what might be called a 'chain of greed,' " including accountants who "either looked the other way or neglected to scour the institutions' books too carefully"); Wayne, *Where Were the Accountants?*, N.Y. Times, Mar. 12, 1989, § 3, at 1, col. 2 (detailing accounting firms' intimate involvement with numerous fraudulent savings and loan institutions).

have forgotten the integral role which at least three of them (or their predecessor firms) – Arthur Andersen & Co., Arthur Young & Co. and Touche Ross & Co. – played in assisting[14] twice convicted (federal *and* state court) felon Charles H. Keating, Jr. to carry out one of the largest fraudulent schemes in our nation's history, one which cost the taxpayers $2 billion and defrauded over 23,000 elderly residents of Southern California of their life's savings. *See In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1441-47, 1464-66 (D. Ariz. 1992) (*"ACC/Lincoln"*) (denying motions for summary judgment and detailing accountants' principal roles in aiding and abetting Keating's massive fraud and criminal scheme); 140 F.R.D. 425, 435-41 (D. Ariz. 1992) (detailing bond purchasers' testimony concerning how

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[14] In that case, Arthur Andersen & Co. fraudulently backdated loan data and "stuffed" files with loan documentation. *See* Thomas, *Regulators Cite Delays and Phone Bugs in Examination, Seizure of Lincoln S&L*, Wall St. J., Oct. 27, 1989, at A4, col. 2. The accounting firm paid $30 million to settle investors' claims. Arthur Young & Co. – the predecessor firm to Ernst & Young – gave ACC and Lincoln Savings unqualified auditing opinions even though federal examiners claimed Lincoln was insolvent. The accounting firm did not mention in its opinions the potential problems with Lincoln. Based on the firm's report that ACC's and Lincoln's financial condition were accurately represented, ACC sold $200 million of junk bonds to over 23,000 elderly investors. Following these sales, Arthur Young's senior partner who handled ACC/Lincoln's account resigned from the accounting firm and accepted a $930,000 position with ACC, four times greater than his annual compensation at Arthur Young. *See* Nash, *Auditors of Lincoln on the Spot*, N.Y. Times, Nov. 14, 1989, at D1, col. 3. Arthur Young paid $64 million to settle investors' claims.

they were defrauded by Keating and his compliant professionals – lawyers, accountants, consultants and investment bankers – through the sale of worthless securities).[15] In short, the accounting profession's exposure to liability is not the result of any so-called "tort explosion" but, rather, the culmination of their increasing willingness to surrender their professional integrity and ethics in willing service of financial charlatans and criminals.

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[15] The accounting profession's pattern of willfully assisting financial fraud is not limited to the above-referenced recent cases (including *ACC/Lincoln*) involving *amici* Arthur Andersen & Co., Deloitte & Touche and Ernst & Young and/or their predecessor firms; for details concerning *amicus* KPMG Peat Marwick's intimate involvement and assistance in a seven-year scheme to portray a now-bankrupt retailer as a thriving commercial enterprise in order to permit its principals to sell its now-worthless stock to an unsuspecting public, *see In re Crazy Eddie Sec. Litig.*, 1993 U.S. Dist. LEXIS 789 (E.D.N.Y. Jan. 20, 1993). In another financial scandal involving the failure of Penn Square Bank, whose previous auditor had issued a qualified opinion, after lending Peat Marwick partners money to invest in an office complex the Bank hired Peat Marwick and got a clean opinion. Within four months, the Bank collapsed and Peat Marwick ended up settling numerous multi-million dollar suits for undisclosed sums. *See* P. Zweig, *Belly Up: The Collapse of the Penn Square Bank* 174, 259 (1985). For details concerning *amicus* Price Waterhouse's willing assistance in the enormous financial fraud which was an integral part of criminal operations carried out by the notorious Bank of Credit and Commerce International (BCCI) – the largest financial fraud in world history – which deprived almost one million people of their life's savings, *see* U.S. Senate Subcommittee on Terrorism, Narcotics and International Operations, *The BCCI Affair: A Report to the Senate Committee on Foreign Relations* 323-67 (1992).

II. ARGUMENT

A. Responding To Public Policy Concerns And This Court's Mandate In *Haslip*, As Part Of The Democratic Process The Majority Of The States Have Modified Their Laws Governing Punitive Damage Awards And This Court Should Not Interfere With That Continuing Political Process

Over the past ten years, whether in response to public policy concerns or other factors, the elected representatives of the people have taken responsible step to substantially modify their respective States' laws concerning punitive damage awards. Those modifications have taken various forms, including (1) imposing statutory "caps" or proportionality rules on punitive damage awards; (2) requiring a finding of clear and convincing evidence (or even proof beyond a reasonable doubt) before such damages may be awarded; (3) requiring bifurcated trials in which the trier of fact must determine defendant's liability for punitive damages before it assesses such damages; (4) authorizing only trial judges to assess punitive damages if a jury has determine that they are warranted; (5) requiring trial courts to exercise their power of remittitur to reduce excessive punitive damage awards; and/or (6) requiring successful plaintiffs to share punitive damage awards with the State. *See* Appendices A-F, *infra*.[16] These legislative reforms demonstrate that the arguments raised against the old

[16] According to the Research and Policy Committee of the Committee for Economic Development, *Who Should Be Liable? A Guide to Policy for Dealing With Risk*, 103-05 & n.69 (May 1989), at least 28 states had statutorily modified their punitive damages laws since 1985. That number has since increased to an overwhelming majority of the States.

system of punitive damages have been persuasive, at least in some quarters; however, "it does not make a case that change is constitutionally required and may indeed be better evidence that the issue of punitive damages is a policy matter appropriately left to legislatures and, perhaps, to courts exercising their common law powers." Riggs, 52 Ohio St. L. J. at 876.[17] The States' legislative response to the so-called punitive damages "crisis"[18] may be categorized as follows:

[17] These legislative reforms include every solution to the punitive damages "problem" ever suggested by any Justice of this Court, *see Haslip*, 111 S. Ct. at 1064 (O'Connor, J., dissenting), as well as those advocated by commentators sympathetic to Petitioner and its *amici*. *See* Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 735-38 (1982); Wheeler, *A Proposal For Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 947-60 (1982).

[18] A number of commentators have challenged the popular notion that "awards of punitive damages are skyrocketing." *Browning-Ferris Indus.*, 492 U.S. at 282 (O'Connor, J., dissenting). The author of a comprehensive empirical study of punitive damages awards in products liability cases concluded that both the frequency and size of punitive damages awards is "much less" than is generally believed. Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* 28 (Papers of the Roscoe Pound Found. 1991); *see also* Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?*, 140 U. Pa. L. Rev. 1147, 1256 (1992) (noting that while the mean (*i.e.*, average) size of jury verdicts has increased due to a "very few cases with exceptionally large awards," median awards have risen only moderately); Daniels & Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 13 (1990) (observing that "the punitive damages debate has become a matter of public relations, propaganda, and the mobilization of prejudice and fear, rather than a matter of rational discourse").

Bifurcation: Nine states – California, Connecticut, Georgia, Kansas, Minnesota Montana, Nevada New Jersey and Ohio – require by statute bifurcation of the liability and damages phases of trials in which punitive damages may be assessed,[19] while the Supreme Court of Tennessee recently imposed the same requirement.[20]

Burdens of Proof: The function of the standard of proof is to "allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979).[21] The legislatures of eighteen States – Alabama,

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[19] *See* Cal. Civ. Code § 3295(d) (West 1993 Cum. Supp.); Conn. Gen. Stat. Ann. § 52-240b (West 1991); Ga. Code Ann. § 51-12-5.1(d) (1992 Cum. Supp.); Kan. Code Civ. Proc. § 60-3701(a)-(b) (West 1992 Supp.); Minn. Stat. Ann. § 549.20(4) (West 1993 Cum. Supp.); Mont. Code Ann. § 27-1-221(7) (1992); Nev. Rev. Stat. § 42.005(3) (1991); N.J. Stat. Ann. § 2A:58C-5(b), (d) (West 1987); Ohio Rev. Code Ann. § 2315.21(C)(2) (Baldwin 1991). These statutory provisions are summarized and/or quoted in Appendix A, *infra*.

[20] *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) ("In a trial where punitive damages are sought, the court, upon motion of defendant, shall bifurcate the trial. During the first phase, the factfinder shall determine (1) liability for, and the amount of, compensatory damages and (2) liability for punitive damages . . . During this phase, evidence of a defendant's financial affairs, financial condition, or net worth is not admissible. If the factfinder finds a defendant liable for punitive damages, the amount of such damages shall then be determined in an immediate, separate proceeding.").

[21] In the words of this Court, the "clear and convincing evidence" standard has been used "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant" because "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the

Alaska, California, Colorado, Georgia, Indiana, Kansas, Kentucky, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota and Utah – have enacted statutes imposing higher standards of proof,"[22] while the courts of five additional

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plaintiff's burden of proof." *Addington v. Texas*, 441 U.S. at 423 (holding due process requires clear and convincing standard of proof in civil commitment proceedings); *see also In re Winship*, 397 U.S. 358, 361-64 (1970) (due process requires higher standard of proof for criminal convictions because of important liberty interests and stigmatization at stake). According to one view, this rationale encompasses actions in which punitive damages may be awarded. *See Haslip*, 111 S. Ct. at 1062 (O'Connor, J., dissenting) ("[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake."); *see also* Ellis, *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 994-95 (1989); Wheeler, *The Constitutional Case For Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 298 (1983).

[22] *See, e.g.*, Ala. Code § 6-11-20(a) (1992 Cum. Supp.); Alaska Stat. Ann. § 09.17.020 (1992); Cal. Civ. Code § 3294(a) (West 1993 Cum. Supp.); Colo. Rev. Stat. § 13-25-127(2) (West 1989); Ga. Code Ann. § 51-12-5.1(b) (1992 Cum. Supp.); Ind. Stat. Ann. § 34-4-34-2 (Burns 1986); Kan. Civ. Proc. Code Ann. § 60-3701(c) (West 1992 Supp.); Ky. Rev. Stat. § 411.184(2) (1992); Minn. Rev. Stat. Ann. § 549.20(1)(a) (West 1993 Cum. Supp.); Mont. Code Ann. § 27-1-221(5) (1991); Nev. Rev. Stat. § 42.005(1) (1991); N.D. Cent. Code § 32-03.2-11 (1991 Cum. Supp.); Ohio Rev. Code Ann. § 2315.21(C)(3) (Baldwin 1991); Okla Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. § 30.925(1) (1988); S.C. Code Ann. § 15-33-135 (1992 Cum. Supp.); S.D. Codified Laws Ann. § 21-1-4.1 (1987); Utah Code Ann. § 78-18-1(1)(a) (1992). These statutory provisions are summarized and/or quoted in Appendix B, *infra*. *But see* Idaho Code § 6-1604 (1990) (codifying "preponderance of the evidence standard" for punitive damage claims); *see also* Iowa Code Ann. § 668A.1(1)(a) (West 1987) (jury must decide "[w]hether, by a preponderance of clear, convinc-

States – Arizona,[23] Hawaii,[24] Maine,[25] Maryland[26] and

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ing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another").

[23] *See Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 681 (1986) ("As this remedy is only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil mind over and above that required for the commission of a tort, we believe it appropriate to impose a more stringent standard of proof.").

[24] *See Masaki v. General Motors Corp.*, 71 Haw. 1, 780 P.2d 566, 571 (1989) ("[P]unitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction. It is because of the penal character of punitive damages that a standard of proof more akin to that required in criminal trials is required. . . . A more stringent standard of proof will assure that punitive damages are properly awarded.").

[25] *See Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985) ("The potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence. Therefore, we hold that a plaintiff may recover exemplary damages based on tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice.").

[26] In *Owens-Illinois v. Zenobia*, 325 Md. 420, 601 A.2d 633 (Md. 1992), the Supreme Court of Maryland conducted a survey of other states' statutes and judicial decisions before adopting the clear and convincing evidence standard:

> Use of a clear and convincing standard of proof will help to insure that punitive damages are properly awarded. We hold that this heightened standard is appropriate in the assessment of punitive damages because of their penal nature and potential for debilitating harm. Consequently, in *any* tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages.

601 A.2d at 648 (emphasis in original).

Wisconsin[27] – have adopted the same rule, even though in *Haslip* this Court rejected the argument that due process requires a heightened standard of proof of punitive damages:

> We have considered the arguments raised by [some of the parties] as to the constitutional necessity of imposing a standard of proof of punitive damages higher than "preponderance of the evidence." There is much to be said in favor of a State's requiring, as many do, a standard of "clear and convincing evidence" or, even, "beyond a reasonable doubt," as in the criminal context. We are not persuaded, however, that the due process clause requires that much.

111 S. Ct. at 1046 n.11 (citations omitted). Thus, nearly half of the States have already imposed proof requirements beyond what this Court requires to satisfy due process.[28]

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[27] *See Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W. 2d 437, 443 (1980).

[28] *See also Campbell v. Bartlett*, 975 F.2d 1569, 1577 (10th Cir. 1992) (refusing to set aside punitive damages verdict because the trial court "correctly applied New Mexico law requiring proof of punitive damages by a preponderance of the evidence" and "the United States Supreme Court has not held that due process requires a heightened standard of proof of punitive damages") (citations omitted); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1099 (5th Cir. 1991) ("Texas law authorizes recovery of punitive damages upon proof that a preponderance of the evidence justifies the award. Celotex cannot establish that constitutional due process requires a higher standard of proof based only upon a policy preference expressed by the United States Supreme Court.") (citation omitted), *cert. denied*,

Evidentiary Limitations: Seven States – California, Colorado, Maryland, Montana, Nevada, Oregon and Utah – have enacted statutes precluding the introduction of evidence regarding a defendant's financial condition or net worth until the jury has determined that that defendant is liable for punitive damages.[29]

Jury Instructions: At least six states – Alabama, Colorado, Kentucky, Minnesota, Montana and New Jersey – have codified jury instructions governing awards of punitive damages.[30]

Allocation of Damages: Because punitive damages are not compensatory in nature and their primary purpose is to advance the public good through specific and general

deterrence, nine States – Colorado, Florida, Georgia, Illinois, Iowa, Kansas, New York, Oregon and Utah – allocate a portion of every punitive damages award to a state agency.[31]

Cap Statutes: Ten states – Alabama, Colorado, Connecticut, Florida, Georgia, Kansas, Nevada, Oklahoma, Texas and Virginia – have enacted so-called "caps" on punitive damages awards.[32]

Remittitur: All but four States – Iowa, Kentucky, Missouri and Oregon – permit trial court remittitur of excessive punitive damages and numerous States have codified the trial court's authority and/or responsibility

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___ U.S. ___, 112 S. Ct. 1778 (1992); *Galjour v. General Am. Tank Car Corp.*, 764 F. Supp. 1093, 1101 (E.D. La. 1991) (interpreting footnote 11 in *Haslip* decision as a holding that the "preponderance of the evidence standard" satisfies due process).

[29] *See, e.g.*, Cal. Civ. Code § 3295(d) (West 1993 Cum. Supp.); Colo. Rev. Stat. § 13-21-102(6) (West 1989); Md. Code Ann. § 10-913(a) (1989); Mont. Code Ann. § 27-1-221(7) (1991); Nev. Rev. Stat. § 42.005(4) (1991); Or. Rev. Stat. Ann. § 30.925(2) (1988); Utah Code Ann. § 78-18-1(2) (1992). These statutory provisions are summarized and/or quoted in Appendix C, *infra*. In addition, as noted above (*see* note 20, *supra*), in *Hodges v. S.C. Toof & Co.*, 833 S.W. 2d at 901, the Supreme Court of Tennessee expressly stated that during the first (liability) phase of the required bifurcated trial, "evidence of a defendant's financial affairs, financial condition, or net worth is not admissible."

[30] *See, e.g.*, Ala. Code § 6-11-20(b)(1)-(3) (1992 Cum. Supp.); Colo. Rev. Stat. § 13-21-102(1)(b) (West 1989); Ky. Rev. Stat. Ann. § 411.184(1)(a)-(c) (1992); Minn. Stat. Ann. § 549.20(3) (West 1993 Cum. Supp.); Mont. Code Ann. § 27-1-221(2)-(4) (1991); N.J. Stat. Ann. § 2A:58C-5(a) (West 1987). These statutory provisions are summarized and/or quoted in Appendix D, *infra*.

[31] *See, e.g.*, Colo. Rev. Stat. § 13-21-102(4) (West 1989); Fla. Stat. Ann. § 768.73(2)(a)(b) (West 1993 Cum. Supp.); Ga. Code Ann. § 51-12-5.1(e)(2) (1992 Cum. Supp.); Ill. Rev. Stat. ch. 110, ¶2-1207 (Smith-Hurd 1992 Cum. Supp.); Iowa Code Ann. § 668A.1(2)(b) (West 1987); Kan. Civ. Proc. Code Ann. § 60-3402(e) (West 1992 Supp.); N.Y. Civ. Proc. L. & R. § 8701(1) (McKinney 1993 Cum. Supp.); Or. Rev. Stat. § 18.540(1) (1992 Cum. Supp.); Utah Code Ann. § 78-18-1(3) (1992). These statutory provisions are summarized and/or quoted in Appendix E, *infra*.

[32] *See, e.g.*, Ala. Code § 6-11-21(1)-(3) (1992 Cum. Supp.); Colo. Rev. Stat. § 13-21-102(1)(a) (West 1989); Conn. Gen. Stat. § 52-240b (West 1991); Fla. Stat. Ann. § 768.73(1)(a)-(b) (West 1993 Cum. Supp.); Ga. Code Ann. § 51-12-5.1(g) (1992 Cum. Supp.); Kan. Civ. Proc. Code Ann. § 60-3701(e)(1)-(2), (f) (1992 West Supp.); Nev. Rev. Stat. Ann. § 42.005.1(a)-(b) (1991); Okla Stat. Ann. tit. 23, § 9 (West 1987); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (1993 Cum. Supp.); Va. Code Ann. § 8.01-38.1 (1992). These statutory provisions are summarized and/or quoted in Appendix F, *infra*. *See generally* Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 Emory L. J. 303 (1991).

to carefully review punitive damages awards to determine whether remittitur is necessary.[33]

These legislative enactments demonstrate that the States are responsive to arguments concerning the incidence and amount of punitive damages awards and have taken appropriate steps, as representatives of the people, to insure that defendants receive every applicable measure of procedural due process. Given this impressive record of achievement, this Court should not dictate to the States the precise manner in which they must address the issues presented in such cases.

B. The Federal And State Trial And Appellate Courts Have Taken Seriously This Court's Mandate In *Haslip* And, During The Past Two Years, Have Carefully Reviewed And Even Reduced Numerous Punitive Damages Awards

Two years ago, in *Haslip* this Court ruled that unlimited jury or judicial discretion in the fixing of punitive damages may invite extreme results that are unacceptable under the Due Process Clause. Although a mathematical "bright line" cannot be drawn between the constitutionally acceptable and the constitutionally unacceptable that would fit every case, this Court noted that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter

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[33] *See, e.g.*, Ala. Code § 6-11-25 (1992 Cum. Supp.); Ark. Code Ann. § 16-64-124 (1987); Colo. Rev. Stat. § 13-21-102(1); Fla. Stat. Ann. § 768.74 (West 1993 Cum. Supp.); Ill. Rev. Stat. Ann. ch. 110, ¶2-1207 (Smith-Hurd 1992 Cum. Supp.); Mont. Code Ann. § 27-1-221(7)(c) (1991). *See generally* 2 J. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice*, § 18.02 n.6 (Supp. 1989).

into the constitutional calculus." 111 S. Ct. at 1043. Having reviewed the procedures followed by the Alabama trial and appellate court in *Haslip*, this Court concluded that due process had not been violated because the award did not lack objective criteria and was subject to the full panoply of procedural protection. *Id.* at 1044-46.[34]

Judged by these standards, the decision of the Supreme Court of Appeals of West Virginia in this case clearly passes constitutional muster. *TXO*, 419 S.E. 2d at 886-90. It provides but one example of the federal and state trial and appellate courts' careful adherence to the principles laid down by this Court in *Haslip*. Reference to other post-*Haslip* decisions demonstrates with equal vigor that the federal and state courts are providing meaningful post-verdict and appellate review, whether under

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[34] As this Court noted in *Haslip*, first, the trial court's instructions placed reasonable constraints on the exercise of the jury's discretion by expressly describing punitive damages' purpose of retribution and deterrence, by requiring the jury to consider the character and degree of the particular wrong and by explaining that the imposition of punitive damages was not compulsory. 111 S. Ct. at 1044. Second, the trial court conducted a post-verdict hearing which provided a meaningful review of the amount of punitive damages fixed by the jury. *Id.* Third, the Supreme Court of Alabama also provided a meaningful review of the jury verdict and the trial court's discretion, which "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." *Id.* at 1045. In the recent words of the Fifth Circuit, *Haslip* "stand[s] for the general proposition that a punitive damage award by a properly instructed jury, where there is adequate post-verdict review, will not violate due process." *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1020 (5th Cir. 1992) (citing *Haslip*, 111 S. Ct. at 1044-45).

applicable State law or Fed. R. Civ. P. 59,[35] of punitive damages awards in tort cases of every stripe,[36] including actions for fraud,[37] tortious interference with con-

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[35] In the words of this Court, "[i]n reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The Court of Appeals should then review the District Court's determination under an abuse of discretion standard." *Browning-Ferris Indus.*, 492 U.S. at 279.

[36] The Fourth Circuit has stated that "[i]t would appear that the *Haslip* decision has, at least, compelled most state courts which have subsequently faced the due process issue to reconsider the constitutionality of their schemes for punitive damages." *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1417 (4th Cir. 1992) (applying Virginia law). In that case, the Fourth Circuit reversed a $175,000 punitive damages award because the jury had not been properly instructed. *See also Gamble v. Stevenson*, 305 S.C. 104, 406 S.E. 2d 350, 354 (1991) (establishing eight factor post-trial review of punitive damages awards in wake of *Haslip*); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc.*, 88 Md. App. 672, 596 A.2d 687, 711-12 (Spec. App.) (establishing "proper guidance" for jury's consideration of punitive damages claims in wake of *Haslip*), *cert. denied*, 323 Md. 1, 590 A.2d 158 (1991); *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E. 2d 897, 908 (1991) (establishing "a new system for the review of punitive damages" as a result of *Haslip*).

[37] *See Robertson Oil Co. v. Philips Petroleum Co.*, 979 F.2d 1301, 1303-07 (8th Cir. 1992) (applying Arkansas law) (affirming two punitive damages awards – one for $4 million for fraud and one for $4 million for tortious interference with business relationship – in distributor's lawsuit against oil company because state law "shock the conscience" standard and ten-part inquiry satisfied *Haslip* standards), *rehearing, en banc, granted*, 1993 U.S. App. LEXIS 1284 (8th Cir. Jan. 27, 1993); *Latham Seed Co. v. Nickerson American Plant Breeders, Inc.*, 978 F.2d 1493, 1500-01 (8th Cir. 1992) ($1 million punitive damages award in favor of

tracts[38] or business relationships,[39] invasion of

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each of ten of seed stock company's distributors for company's breach of contract and fraud did not violate due process requirements where trial court carefully instructed jury on applicable law of four states – Indiana, Iowa, Michigan and Ohio – concerning nature and purpose of punitive damages and trial court also thoroughly reviewed damage awards under relevant state law standards); *Stephens, Inc. v. Geldermann, Inc.*, 962 F.2d 808, 814-15 (8th Cir. 1992) (applying Illinois law) (affirming $1 million punitive damages award in fraud action brought by corporate customer against commodity futures merchant); *Braswell v. Conagra, Inc.*, 936 F.2d 1169, 1175-76 (11th Cir. 1991) (applying Alabama law) (affirming $9.1 million punitive damages award to 268 chicken growers in class action fraud claims against corporate buyer of broilers); *Jacobs Mfg. Co. v. Sam Brown Co.*, 792 F. Supp. 1520, 1532-39 (W.D. Mo. 1992) (setting aside jury's $2.7 million punitive damages award for defendant distributor's fraud counterclaim against manufacturer).

[38] *See Benny M. Estes & Assoc. v. Time Ins. Co.*, 980 F.2d 1228, 1234-36 (8th Cir. 1992) (affirming punitive damages award of $1.7 million based upon insurance company's tortious interference with contracts between Arkansas agents and sub-agents); *Lightning Lube v. Witco Corp.*, 802 F. Supp. 1180, 1199-1201 (D.N.J. 1992) (setting aside jury's $50 million punitive damages award for franchisees in fraud and tortious interference with contracts action against franchisor); *Fraidin v. Weitzman*, 93 Md. App. 168, 611 A.2d 1046, 1063-71 (1992) (reversing $2 million punitive damages award in action for tortious interference with contract brought by discharged attorneys against former client's opponent).

[39] *See Hilgedick v. Koehring Finance Corp.*, 5 Cal. App. 4th 1118, 8 Cal. Rptr. 2d 76, 84-91 (1992) (affirming $11 million punitive damages award to debtors in action against creditors arising out of interference with business relationships), *review granted*, 1992 Cal. LEXIS 3751, 10 Cal. Rptr. 2d 183, 832 P.2d 899 (1992); *MGW, Inc. v. Fredericks Devel. Corp.*, 5 Cal. App. 4th 92, 6 Cal. Rptr. 2d 888, 892-900 (1992) (affirming $2 million punitive damages award to real estate broker in action against developer

privacy,[40] false endorsement,[41] securities fraud,[42]

alleging interference with business relationships), *review granted*, 1992 Cal. LEXIS 3500, 10 Cal. Rptr. 2d 85, 832 P.2d 586 (1992).

[40] *See Peoples Bank & Trust Co. v. Globe Int'l Pub. Co.*, 978 F.2d 1065, 1071 (8th Cir. 1992) ($850,000 punitive damages award upheld in invasion of privacy case under Arkansas law where jury found by clear and convincing evidence that defendant acted with malice and jury instructions incorporated *Haslip* criteria); *Doe By Doe v. B.P.S. Guard Svcs., Inc.*, 945 F.2d 1422, 1428 (8th Cir. 1991) (applying Missouri law) (remanding case for consideration of defendant's post-trial motion for remittitur in invasion of privacy case in light of *Haslip* criteria).

[41] *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1104-06 (9th Cir. 1992) (affirming $2 million punitive damages award in false endorsement action because it was supported by clear and convincing evidence, as required under California law).

[42] *See Jordan v. Clayton Brokerage Co. of St. Louis*, 975 F.2d 539, 541-42 (8th Cir. 1992) ($400,000 punitive damages award affirmed in investor's churning case against securities brokerage where jury instructions given under Missouri law and post-verdict standard of review complied with *Haslip*) *cert. denied*, 1993 U.S. LEXIS 1211 (1993); *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, MDL Docket No. 834 (D. Ariz. Oct. 27, 1992) (reducing $3.3 billion jury verdict to $1.75 billion and reducing punitive damages component from $2.9 billion to $750 million in class action alleging RICO, securities fraud and fraud and deceit).

personal injury[43] and wrongful death,[44] products liability,[45] defamation,[46] conversion[47] and bad faith actions

[43] *See Campbell v. Bartlett*, 975 F.2d at 1575-77 (applying New Mexico law) (affirming $200,000 punitive damages award in drunk driving case); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 98-110 (4th Cir. 1991) (applying South Carolina law) (reversing $100,000 punitive damages award in auto accident case when state law denied defendant due process because lack of meaningful standards allowed jury to exercise unconstrained discretion in making its award); *Wollersheim v. Church of Scientology*, 4 Cal. App. 4th 1074, 6 Cal. Rptr. 2d 532, 536-47 (1992) (finding $24 million punitive damages award for intentional infliction of emotional injury in former adherent's action against religious organization excessive and reversing judgment unless plaintiff accepted remittitur to $2 million).

[44] *See General Motors Corp. v. Johnston*, 592 So. 2d 1054, 1060-64 (Ala. 1992) ($15 million punitive damages award in wrongful death action held excessive and remittitur to $7.5 million ordered).

[45] *See Mason v. Texaco, Inc.*, 948 F.2d 1546, 1559-61 (10th Cir. 1991) (applying Kansas law) (finding excessive a $25 million punitive damages award in benzene poisoning case and ordering a remittitur of award to $12.5 million), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1941 (1992); *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1238-43 (S.D. Iowa 1991) (reducing $50 million punitive damages verdict to $28 million in farm worker's product liability action against combine manufacturer).

[46] *See Brown v. Petrolite Corp.*, 965 F.2d 38, 49-50 (5th Cir. 1992) (applying Texas law) (affirming $700,000 punitive damages award in favor of oil services company arising out of competitor's publication of defamatory reports concerning plaintiff's products).

[47] *See Broadcort Capital Corp. v. Summa Medical Corp.*, 972 F.2d 1183, 1193-94 (10th Cir. 1992) (applying New Mexico law) (affirming $400,000 punitive damages award in stock certificate conversion case); *Cole v. Control Data Corp.*, 947 F.2d 313, 319-20 (8th Cir. 1991) (applying Missouri law) (remanding case so that district court could review $500,000 punitive damages award in

against insurers.[48] These cases unequivocally demonstrate the federal and state courts' careful scrutiny of all punitive damages awards in the wake of this Court's decision in *Haslip* and the substantial reduction of many excessive verdicts. Thus, the present system already weeds out insupportable punitive damages awards and there is no basis for this Court's imposition of additional standards in a field which should be left to the States.

III. CONCLUSION

For the reasons stated above, NASCAT respectfully submits that the decision of the court below should be affirmed.

March 1993

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conversion of computer software suit under *Haslip* standards applying state law principles).

[48] *See Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1380-86 (5th Cir. 1991) (applying Mississippi law) (affirming $500,000 punitive damages award, in addition to compensatory damages of $1,000, following bench trial in insured's action against insurer for wrongful denial of claim); *Intercontinental Life Ins. Co. v. Lindblom*, 598 So. 2d 886, 890-91 (Ala. 1992) (reaffirming $1 million punitive damages award in bad faith case after reconsideration in light of *Haslip*), *cert. denied*, ___ U.S. ___, 113 S. Ct. 200 (1992); *Republic Ins. Co. v. Hires*, 810 P.2d 790, 792-93 (Nev. 1991) (reducing $22.5 million punitive damages award in insured's bad faith action against insurer to $5 million).

APPENDIX A

Statutes Requiring Bifurcation Of
Liability And Damages Determinations
In Punitive Damages Actions

California: The trial court "shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud." Evidence of profit and financial condition "shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud" and such evidence "shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud." Cal. Civ. Code § 3295(d) (West 1993 Cum. Supp.).

Connecticut: Conn. Gen. Stat. Ann. § 52-240(b) (West 1991) states that "[i]f the trier of fact determines that punitive damages should be awarded" in a products liability action, "the court shall determine the amount of such damages not to exceed the amount equal to twice the damages awarded to the plaintiff."

Georgia: Ga. Code Ann. § 51-12-5.1(d)(1)-(2) (1992 Cum. Supp.) provides that "[i]n any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made." If it is found that punitive damages are to be awarded, "the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what

amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances. It shall then be the duty of the trier of fact to set the amount to be awarded. . . . "

Kansas: Kan. Code Civ. Proc. § 60-3701(a)-(b) (West 1992 Supp.) ("In any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded. . . . At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded. . . . ").

Minnesota: Minn. Stat. Ann. § 549.20(4) (West 1993 Cum. Supp.) ("In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.").

Montana: Mont. Code Ann. § 27-1-221(7) (1991) ("When the jury returns a verdict finding a defendant liable for punitive damages, the amount of damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review. . . . ").

Nevada: Nev. Rev. Stat. § 42.005(3) (1991) ("If punitive damages are claimed . . . the trier of fact shall make a

finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed.").

New Jersey: N.J. Stat. Ann. § 2A:58C-5(b), (d) (West 1987) ("The trier of fact shall first determine whether compensatory damages are to be awarded. Evidence relevant only to punitive damages shall not be admissible in that proceeding. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether punitive damages are to be awarded. . . . If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those damages. . . . ").

Ohio: Ohio Rev. Code Ann. § 2315.21(C)(2) (Baldwin 1991) provides that "[i]n a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court."

APPENDIX B

Statutes Imposing Heightened Burdens
Of Proof In Punitive Damages Actions

Alabama: Ala. Code § 6-11-20(a) (1992 Cum. Supp.) (punitive damages may not be awarded "other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff"); *see also id.*, § 6-11-20(b)(4) (defining "clear and convincing evidence").

Alaska: Alaska Stat. Ann. § 09.17.020 (1992) ("Punitive damages may not be awarded in any action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence.").

California: Cal. Civ. Code § 3294(a) (West 1993 Cum. Supp.) provides that "[i]n an action for breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Colorado: Colo. Rev. Stat. § 13-25-127(2) (West 1989) requires proof *beyond a reasonable doubt* to support a punitive damages award.

Georgia: Ga. Code Ann. § 51-12-5.1(b) (1992 Cum. Supp.) (plaintiff must show by "clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire

want of care which would raise the presumption of conscious indifference to consequences").

Indiana: Ind. Stat. Ann. § 34-4-34-2 (Burns 1986) ("Before a person may recover punitive damages in any civil action, that person must establish, by clear and convincing evidence, all of the facts that are relied upon by that person to support his recovery of punitive damages.").

Kansas: Kan. Civ. Proc. Code Ann. § 60-3701(c) (West 1992 Supp.) ("plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the [bifurcated] trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice").

Kentucky: Ky. Rev. Stat. § 411.184(2) (1992) ("A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.").

Minnesota: Minn. Rev. Stat. Ann. § 549.20(1)(a) (West 1993 Cum. Supp.) ("Punitive damages shall be allowed in civil action only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.").

Montana: Mont. Code Ann. § 27-1-221(5) (1991) (specifying that "[a]ll elements of the claim for punitive damages must be proved by clear and convincing evidence" and defining "clear and convincing evidence").

Nevada: Nev. Rev. Stat. § 42.005(1) (1991) (it must be "proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied").

North Dakota: N.D. Cent. Code Ann. § 32-03.2-11 (1991 Cum. Supp.) (plaintiff must prove that "the defendant has been guilty by clear and convincing evidence of oppression, fraud, or malice, actual or presumed").

Ohio: Ohio Rev. Code Ann. § 2315.21(C)(3) (Baldwin 1991) ("In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that he is entitled to recover punitive or exemplary damages.").

Oklahoma: Okla. Stat. Ann. tit. 23, § 9 (West 1987) (punitive damages may be awarded only "if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed").

Oregon: Or. Rev. Stat. § 30.925(1) (1988) ("In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others.").

South Carolina: S.C. Code Ann. § 15-33-135 (1992 Cum. Supp.) ("In any civil action where punitive damages are

claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.").

South Dakota: S.D. Codified Laws Ann. § 21-1-4.1 (1987) ("In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based on clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.").

Utah: Utah Code Ann. § 78-18-1(1)(a) (1992) ("[P]unitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.").

APPENDIX C

Statutes Imposing Limitations
On Admissible Evidence
In Punitive Damages Actions

California: Cal. Civ. Code § 3295(d) (West 1993 Cum. Supp.); *see* Appendix A, *supra*.

Colorado: Colo. Rev. Stat. § 13-21-102(6) (West 1989) ("In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages.").

Maryland: Md. Code Ann. § 10-913(a) (1989) ("In any action for punitive damages for personal injury, evidence of the defendant's financial means is not admissible until there has been a finding of liability and that punitive damages are supportable under the facts.").

Montana: Mont. Code Ann. § 27-1-221(7) (1991) provides that "[e]vidence regarding a defendant's financial affairs, financial condition, and net worth is not admissible in a trial to determine whether a defendant is liable for punitive damages." If the jury determines that a defendant is liable for punitive damages, "[i]n the separate proceeding to determine the amount of punitive damages to be awarded, the defendant's financial affairs, financial condition, and net worth must be considered." *Id.*

Nevada: Nev. Rev. Stat. § 42.005(4) (1991) ("Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the

subsequent proceeding to determine the amount of . . . punitive damages to be assessed.").

Oregon: Or. Rev. Stat. Ann. § 30.925(2) (1988) ("During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover. . . . ").

Utah: Utah Code Ann. § 78-18-1(2) (1992) ("Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.").

APPENDIX D

Statutes Codifying Jury Instructions
Governing Consideration Of
Punitive Damages Awards

Alabama: Ala. Code § 6-11-20(b)(1)-(3), (5) (1992 Cum. Supp.) (defining "fraud," "malice," "wantonness" and "oppression").

Colorado: Colo. Rev. Stat. § 13-21-102(1)(b) (West 1989) (defining "willful and wanton conduct").

Kentucky: Ky. Rev. Stat. Ann. § 411.184(1)(a)-(c) (1992) (defining "oppression," "fraud" and "malice").

Minnesota: Minn. Stat. Ann. § 549.20(3) (West 1993 Cum. Supp.) provides that any award of punitive damages "shall be measured by those factors which justly bear upon the purpose of punitive damages," including "the seriousness of hazard to the public arising from the defendant's misconduct," the "profitability of the misconduct to the defendant," the "duration of the misconduct and any concealment of it," the "degree of the defendant's awareness of the hazard and of its excessiveness," the "attitude and conduct of the defendant upon discovery of the misconduct," the "number and level of employees involved in causing or concealing the misconduct," the "financial condition of the defendant," and "the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subjected." *See Kociemba v. G.D. Searle & Co.*, 707

F. Supp. 1517, 1535-38 (D. Minn. 1989) (jury hearing infertility claim awarded plaintiff $7 million in punitive damages, in addition to $750,000 for pain and disability and $1 million for emotional distress).

Montana: Mont. Code Ann. § 27-1-221(2)-(4) (1991) (defining "actual malice" and "actual fraud" as prerequisites for punitive damages award).

New Jersey: For product liability actions, N.J. Stat. Ann. § 2A:58C-5(a) (West 1987) identifies the relevant factors to be considered by the trier of fact, including the profitability of the misconduct, how long it lasted, when it was terminated, conducting indicating reckless disregard of the likelihood of serious harm, conduct aimed at mitigating the harm and the defendant's financial condition. These instructions were upheld against a constitutional challenge on due process grounds in *Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297, 1304 (D.N.J. 1990).

APPENDIX E

Statutes Allocating Punitive Damages
Between Plaintiffs And State Agencies

Colorado: Colo. Rev. Stat. § 13-21-102(4) (West 1989) specifies that "[o]ne-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund" with "[t]he remaining two-thirds of such damages collected shall be paid to the injured party." This statutory provision was declared unconstitutional in *Kirk v. Denver Pub. Co.*, 818 P.2d 262, 266-73 (Colo. 1991), because it was deemed an impermissible "taking" of a property right with no reasonable nexus between the taking and any government services made available to the particular judgment creditor who is forced to make contribution to the state.

Florida: Fla. Stat. Ann. § 768.73(2)(a)-(b) (West 1993 Cum. Supp.) allocates 35% of every punitive damages award to either the State's General Revenue Fund or its Public Medical Assistance Trust Fund. The constitutionality of this provision was upheld against a due process challenge in *Gordon v. State*, 585 So. 2d 1033, 1035-38 (Fla. App. 3d Dist. 1991), *aff'd*, 608 So.2d 800 (Fla. 1992), because the court recognized the Florida legislature's rational basis for allocating to the public a portion of damages that are intended to promote public interests.

Georgia: Ga. Code Ann. § 51-12-5.1(e)(2) (1992 Cum. Supp.) (75% of amounts awarded as punitive damages, "less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge," shall be paid into the State Treasury). This statutory provision was declared unconstitutional in

McBride v. General Motors Corp., 737 F. Supp. 1563, 1578-79 (M.D. Ga. 1990), because it applied only to product liability actions and on Eighth Amendment grounds because the state's 75% share constituted an "excessive fine."

Illinois: Ill. Rev. Stat. ch. 110, ¶2-1207 (Smith-Hurd 1992 Cum. Supp.) allows the trial court to apportion punitive damages among plaintiff, plaintiff's attorney and the Illinois Department of Rehabilitation Services.

Iowa: Iowa Code Ann. § 668A.1(2)(b) (West 1987) (75% of punitive damages award – after payment of costs and fees – allocated to a civil reparations trust fund). A constitutional challenge based on a "taking" argument was rejected by the Supreme Court of Iowa because a plaintiff has no vested property right to punitive damages prior to entry of judgment. *See Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc.*, 473 N.W. 2d 612, 619 (Iowa 1991).

Kansas: Kan. Civ. Proc. Code Ann. § 60-3402(e) (West 1992 Supp.) allocates one-half of punitive damages awards in medical malpractice cases to the State treasury.

New York: N.Y. Civ. Proc. L. & R. § 8701(1) (McKinney 1993 Cum. Supp.) (allocates 20% of every punitive damages award to the State).

Oregon: Or. Rev. Stat. § 18.540(1) (1992 Cum. Supp.) allocates one-half of every punitive damages award to the Criminal Injuries Compensation Account after deducting attorney's fees. In *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 797 P.2d 1019, 210-12 (1990), the Supreme Court of Oregon held that a trial court's instructions containing

a description of the statutory allocation scheme constituted reversible error.

Utah: Utah Code Ann. § 78-18-1(3) (1992) allocates one-half of any award in excess of $20,000 to the State Treasury.

APPENDIX F

Statutes Imposing Caps On Punitive Damages Awards

Alabama: Under Ala. Code § 6-11-21(1)-(3) (1992 Cum. Supp.), an award of punitive damages "shall not exceed" $250,000, unless it is based upon a "pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff," conduct involving "actual malice other than fraud or bad faith," or libel, slander, or defamation. *See Youngblood v. Lawyers Title Ins. Corp.*, 746 F. Supp. 71, 72 (S.D. Ala. 1989), *rev'd on other grounds*, 923 F.2d 161 (11th Cir. 1991).

Colorado: Colo. Rev. Stat. § 13-21-102(1)(a) (West 1989) provides that the amount of punitive damage awarded by the jury "shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party." The trial court may increase any award of punitive damages "to a sum not to exceed three times the amount of actual damages" if it is shown that the defendant "has continued the behavior or repeated the action which is the subject of the claim . . . in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case" or that the defendant "has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff. . . . " *Id.*, § 13-21-102(3)(a)-(b).

Connecticut: Conn. Gen. Stat. § 52-240b (West 1991), which applies to product liability actions, specifies that "[i]f the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such

damages not to exceed an amount equal to twice the damages awarded to the plaintiff."

Florida: Fla. Stat. Ann. § 768.73(1)(a)-(b) (West 1993 Cum. Supp.) provides that "the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded" unless "the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances" of the case.

Georgia: Ga. Code Ann. § 51-12-5.1(g) (1992 Cum. Supp.) (punitive damages awarded in tort actions "shall be limited to a maximum of $250,000").

Kansas: Under Kan. Civ. Proc. Code Ann. § 60-3701(e)(1)-(2) and (f) (1992 West Supp.), no award of punitive damages shall exceed the lesser of "[t]he annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded" or $5 million; however, if the court finds that "the profitability of the defendant's misconduct exceeds or is expected to exceed" that limitation, "the limitation on the amount of exemplary or punitive damages which the court may award shall be an amount equal to 1-1/2 times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct."

Nevada: Nev. Rev. Stat. Ann. § 42.005.1(a)-(b) (1991) provides that an award of punitive damages may not exceed "[t]hree times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory

damages is $100,000 or more" or "[t]hree hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $100,000."

Oklahoma: Okla Stat. Ann. tit. 23, § 9 (West 1987) (jury may award punitive damages "in an amount not exceeding the amount of actual damages awarded"). At the conclusion of all the evidence, if the trial court makes a finding outside of the presence of the jury that there is clear and convincing evidence that defendant is guilty of oppression, fraud, or malice, this limitation on punitive damages does not apply. *See Massey v. Farmers Ins. Group*, 1993 U.S. App. LEXIS 2191, at *21 (10th Cir. Feb. 9, 1993).

Texas: Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (1993 Cum. Supp.) ("exemplary damages awarded against a defendant may not exceed four times the amount of actual damages or $200,000, whichever is greater"). The statutory limitation, however, does *not* apply to punitive damages "resulting from malice . . . or to an intentional tort." *Id.*, § 41.008.

Virginia: Under Va. Code Ann. § 8.01-38.1 (1992), "the total amount awarded for punitive damages against all defendants found to be liable shall be determined by the trier of fact" and "[i]n no event shall the total amount awarded for punitive damages exceed $350,000." The statute specifies that the jury "shall not be advised of" this limitation; however, "if a jury returns a verdict for punitive damages in excess of the maximum amount specified . . . the judge shall reduce the award and enter judgment for such damages in the maximum amount

provided" by the statute. *See Wackenhut Applied Technologies v. Sygnetron*, 979 F.2d at 983-85 (affirming that Virginia statute applies to intentional torts).